THE REBUPLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CV – CS – 026 OF 2012

KABIITO TELESPHORUS.....PLAINTIFF

VERSUS

1. ATTORNEY GENERAL

2. DR. KWIKIRIZA NICHOLAS .....DEFENDANTS

3. THE MEDICAL SUPERITENDANT

FORT PORTAL REFERAL HOSPITAL

BEFORE: HIS LORDSHIP HON. JUSTICE WILSON MASALU MUSENE

Judgment

The Plaintiff, Kabiito Telephorus, filed this suit against the three Defendants, namely; Attorney General, Dr. Kwikiriza Nicholas and the medical superintendent Fort Portal Referral Hospital. M/s Kaahwa, Kafuuzi, Bwiruka & Co. Advocates represented the Plaintiff, while the Defendants were jointly represented by Attorney General's Chambers, Fort Portal.

Background:

The Plaintiff brought this suit as a husband of Katusabe Elizabeth alias E.G Katusabe the deceased on his own behalf and on behalf of the family for the benefit of the estate of the deceased under the Law Reform (Miscellaneous Provisions) Act claiming special, general damages for negligence, unlawful death, loss of life, loss of dependency, care, pain and suffering, interest on damages above at 26% per annum from the date of the cause action till payment in full and costs of the suit.

The Plaintiff founded his action in negligence and the particulars of negligence pleaded under paragraph 6 of the plaint were; lack of proper medical attention towards the deceased who

was in labour, failure by the Defendant's workers to provide lifesaving blood, sill and equipment, leaving the deceased to bleed without rescue which resulted into her death, sheer and outright lack of care and indifference towards patients, poor health care and standards in the 1st Defendant's hospital, lack and absence of drugs and facilities.

The Defendants on the other hand averred that the deceased had at all times attended antenatal checkups carried out by Dr. Arthur Ssebuko (DW1) who testified that he discovered that she was expecting a big baby who would not be delivered vaginally. He described her as a risky expectant mother. That he advised her not to go into labour and instead planned a caesarean delivery within two weeks before the delivery. However, she did not attend the said appointment. By the time the deceased reported to Hospital, she was already in labour. The Defendants did all they could to salvage the situation but could only save the baby's life. That it was therefore the deceased who was negligent in failure to adhere to the strict guidelines of a fragile situation.

Issues:

1. Whether the Defendants were and liable in negligence?
2. Whether the Plaintiff is entitled to the remedies sought?

Issue 1: Whether the Defendants were and liable in negligence?

Counsel for the Plaintiff submitted that in order to resolve this issue there is need to first investigate the questions as whether there existed a doctor-patient relationship, whether the 2nd and 3rd Defendants owed the deceased a duty of care, whether the said duty was breached by the Defendants and if so under what circumstances (the nature of the beach) and whether the actions and omissions of the 2nd and 3rd Defendants hold the 1st Defendant vicariously liable.

Counsel for the Plaintiff submitted that PW1 testified that the deceased was his wife died and at the age of 35 years and was employed as a nursing assistant at the 3rd Defendant. That her death was due to the negligence of the 2nd and 3rd Defendants coupled with the lack and absence of drugs. It was further submitted that on 23rd March 2011 at 3:00pm she was taken to the hospital in labour, still alive and not bleeding. That DW2 admitted to having operated the deceased, removed the baby and successfully enabled the deceased to leave the operating table and theatre still alive and that he advised she be transfused with blood.

Counsel for the Plaintiff added that the cause of death was haemorrhagic shock due to or following bleeding after delivering which was due to failure of the uterus to contract. And further that during cross examination DW2 claimed that he found the deceased's uterus having ruptured and that he repaired it and it stopped bleeding. However, the case for the Plaintiff was that this is not true because the cause of death was bleeding after delivery and there was no blood transfusion. That DW2's claims fall short of professional competency and efficiency in a sense that if the uterus had proved to continuously bleed, then it should have been removed. Thus, DW2 failed to exercise such care and skill a reasonably prudent and careful person would use under similar circumstances. That he should have followed up to ensure that the patient had received proper care and had blood transfused since he is the one that had worked on her.

Counsel for the Plaintiff added that the evidence of DW1 that the deceased had a big baby and could not deliver vaginally and the same was indicated on her antenatal card is false and cannot be sustained. That the deceased reported to the hospital at 3:00pm only to be taken to theatre at 5:00pm, and her being a high risk patient she should have been treated as an emergency. Also, that DW1 did not bother to record and make entry of the deceased's condition in the antenatal care register operated by the outpatient department at the 3rd Respondent's hospital to enable other practitioners to rely on the same so as to manage the deceased's risky condition. Therefore, DW1 and DW2 as professional obstetrics and gynaecologists fell short of the professional standard and were negligent making the 1st and 3rd Respondents vicariously liable.

Counsel for the Defendants on the other hand submitted that the deceased failed to take hid of the doctor's advice and chose to come while in labour yet she had been advised to come in two weeks earlier. That in the circumstances there was contributory negligence that led to her death. He defined contributory negligence as per Black's Law Dictionary 10th Edition at page 403 as the principle that completely bars a Plaintiff's recovery if the damage suffered is partly the Plaintiff's own fault. That from the evidence of DW1,the deceased did not show up for the doctor's appointment for the operation well knowing that she had a risky pregnancy. That in the circumstances the deceased who came while in active labour and already bleeding was operated on and the baby saved however, her condition was escalated by her own making.

This Court has considered the evidence on record by both sides and the submissions. I have also analysed the pleadings, including the plaint and the written statement of Defence. It is clear from the pleadings that the Plaintiff lost his wife; Katusabe Elizabeth during child labour at Fort Portal Regional Referral Hospital as a result of what the Plaintiff claims was due to negligence by employees of the Government of Uganda represented by the 1st Defendant, the Attorney General. The Defendants, under paragraph 4 of the written statement of Defence averred that the Plaintiff's suit was not based on any reasonable cause of action, that it was frivolous, vexatious, premature and in breach of the law. During the hearing, the Defendants, through Dr. Ssebuko Arthur (DW1) and Dr. Nicholas Kwikiriza Magambo (DW2) testified that the deceased was admitted when she had escalated into labour, that the deceased reported to hospital late contrary to the doctor's instructions which actions amounted to contributory negligence was not raised or pleaded in the Written Statement of Defence. That was prejudicial to the Plaintiff's case as PW1 was not confronted during cross examination with any averments of DW1 and DW2 and consequently the Plaintiff could not be re-examined on those crucial matters of alleged contributory negligence. That amounted to a departure from the pleadings which is not allowed under Order 6 Rule 7 of the Civil Procedure Rules which provides;

"No pleading shall, not being a petition or application, except by way of amendment, raise any new grounds of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading."

It is therefore clear as was held in **Bat "U" 1984 LTD versus Selestino Mushongore, Supreme Court Civil Appeal No. 26 of 1994**, that contributory negligence should be pleaded and particulars thereof be given.

In the case of **Uganda Breweries Ltd versus Uganda Railways Corporation, SCCA No. 6 of 2001**, it was held that the complaint against departure from pleadings would stand depending on whether the party complaining had a fair notice of the case he had to meet, and whether departure from pleadings caused a failure of justice to the party complaining or whether the departure was a mere irregularity and not fatal to the case of the party whose evidence departed from the pleadings.

In the present case, the Plaintiff had no fair notice as contributory negligence was not raised in the Defendant's Written Statement of Defence and that was greatly prejudicial to the Plaintiff's case as already noted. Therefore reference by Counsel for the Defendant to

Black's Law Dictionary 10th Edition at Page 43 on the definition of contributory negligence is misplaced as contributory negligence was neither pleaded nor particulars given. Be that as it may, I shall now proceed to consider whether there was professional negligence and vicarious liability on the part of the Defendants.

The law relating to medical professional negligence and misconduct as well as the vicarious liability of the medical practitioner and the Hospital has been summed up in the following legal prepositions in a number of decided cases including **Stanley Kamihanda versus Attorney General, HCCS No. 1201 of 1998 reported in KALR [2003] page 333**, and the Kenyan case of **Kimmy Paul Semenye versus Aga Khan Hospital and 2 Others [2006] KLR.**

It is articulated as follows;

"There exists a duty of care between the patient and the doctor, hospital or health provider, and once that relationship is established, then the doctor has a fourfold duty. A party who holds himself as ready to give medical advice or treatment impliedly undertakes that he is possessed of skills and knowledge for the purpose and such person whether he is a registered medical practitioner or not, who is consulted by a patient, owes him certain duties namely, a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment and a duty of care in his administration of that treatment."

Negligence is defined as the act of doing something or an omission by a reasonable man, guided upon considerations which regulate the conduct of human affairs. Further, that in case of negligence there should be a duty of care owed, a breach of that duty and damage suffered by the person to whom the duty was owed. The standard of care in medical negligence differs from that of ordinary cases of negligence. If a professional man posses an art, he must reasonably be skilled in it. He must also be careful, but the standard of care, which the law requires, is not insurance against accidental slips. It is such a degree of care as normally skilful member of the profession may reasonably be expected to exercise in the actual circumstances of the case, and in applying the duty of care to the care of a surgeon, it is peculiarly necessary applying the duty of the different kinds of circumstances that may present themselves for urgent attention.

It is pertinent to not that a charge of professional negligence against a medical practitioner is a grave and serious matter. It stands on a different footing to a charge of negligence against

the driver of a motor car. The consequences are far more serious. It affects his professional status and reputation. The burden is to prove that the damage was caused by negligence and was not a question of misadventure, and that burden must be discharged on a preponderance of evidence. In medical cases the fact that something has gone wrong is not in itself any evidence of negligence. The test used to establish whether there was medical negligence or not is whether there has been negligence or not is not the test of the man on top of the Clapham omnibus, because he has not got this special skill.

The test is the standard of the ordinary skilled man exercising and professing to have that special skill and the true test of establishing negligence and treatment on the part of the doctor is whether he has been proved to have been guilty of such failure as no doctor of ordinary skill would be guilty of it acting within ordinary care or whether it is a case of misadventure or medical negligence. **See: also Blyth versus Birmingham Co. [1856] 11 Exch. 781-784 and Hlasbury's Laws of England Volume 26 Page 17.**

Applying the law as outlined above to the present case, this Court finds and holds that there was a patient doctor relationship between the deceased and the 2nd Defendant, and no doubt the 2nd and 3rd Defendants owed the deceased a duty of care. As will be summarised below from the evidence on record, the said duty of care was breached by the Defendants and therefore further finding and holding of this Court is that the actions and omissions of the 2nd and 3rd Defendants hold that the 1st Defendant vicariously liable.

The Defendants' submissions on the issue of professional negligence was solely based on contributory negligence that the deceased negated on the appointment and advice of the doctors to attend to Hospital for an operation because her pregnancy was a risky one and that she could not wait to go into labour.

This Court has already faulted the Defendants for not pleading contributory negligence and particulars thereof in their Written Statement of Defence. I have already I held that the Defendants cannot depart from their pleadings. A close analysis of the evidence on record reveals that PW1 testified that he is the husband of the deceased Katusabe Elizabeth who was aged 35 years old and working as a nursing assistant at the 3rd Defendant Government Regional Referral Hospital. PW1's further testimony was that 23/3/2011, the deceased was taken to Hospital in labour at 3:00pm. DW2 admitted to have received and admitted the deceased to theatre while the deceased was still alive and not bleeding.

DW2's further evidence was that he operated the deceased, removed the baby and successfully enabled the deceased to leave the operating table and theatre alive. DW2 also advised that the deceased be transfused with blood which was never done.

PW1 on the other hand exhibited **PEX2**, the medical certificate of cause of death dated 30/8/2011 by Dr. Anzivua Sylvester indicating that deceased died of Haemorrhagic shock due to **post-partum Haemorrhage** following uterine atony. DW1 and DW2 explained that **"the cause of death was haemorrhagic shock due to bleeding after delivering as the uterus did not contract."** During cross-examination, DW2 stated that he found the deceased's uterus having ruptured and that he repaired it, but at the same time DW2 admitted that the deceased was not transfused with blood. He also stated that he was not aware whether the post theatre care and treatment was administered onto the deceased mother. Failure to transfuse the deceased after the bleeding led to her death and who was to blame other than the doctors and other staff of the Hospital.

It is also the finding and holding of this Court that DW2's claim that he repaired the ruptured uterus and it stopped bleeding was not true because the bleeding did not stop. DW2 therefore failed to exercise such care and skill reasonably expected of a prudent and careful doctor of his status.

DW2 never followed up to confirm whether blood was being transfused on the deceased and even post theatre care treatment, particularly when the deceased was a fellow workmate. The claim by DW1 that the deceased came late was not the cause of death.

In my view, the 2nd and 3rd Defendants should have considered the deceased's situation as an emergency. it is therefore the finding and holding of this Court that in the circumstances, DW1 and DW2 fell short of the professional standards as obstetrics and gynaecologists and were negligent, thereby making the 1st Defendant vicariously liable. I agree with the testimony of PW1 that his wife's death was caused by the negligence of the 2nd and 3rd Defendants and other employees as there was ultimately no proper medical attention towards the deceased who was in labour. Furthermore, there was failure by the Defendants' workers to provide life saving blood leaving the deceased to bleed without rescue and resulting into her death.

Finally, I find and hold that there was lack of care and indifference towards patients and poor health standards in the 1st Defendant's Hospital and moreover a Regional Referral Hospital.

All that is borne out of the evidence of PW1 and even DW1 and DW2. The 1st issue is therefore resolved in the positive and in favour of the Plaintiff.

Issue two: Whether the Plaintiff is entitled to the remedies sought?

Counsel for the Plaintiff submitted that the Plaintiff prayed for special damages to a tune of UGX 16,300,000/= for medical and funeral expenses though the documentation was lost during the period of the funeral. He also prayed for general damages to a tune of 72,455,400/= due to the loss of dependency and benefits that would accrue to him and the children of the deceased. He prayed for further general damages of UGX 3 billion based on the negligence, unlawful death, loss of life, loss of care, pain and suffering, mental and psychological torture, anguish, pain, the dependants being left motherless by loss of a parent and the Plaintiff being made a widower. Counsel relied on a Kenyan case of **JNB (Deceased) versus The Archdiocese of Nairobi Kenya Registered Trustees & 2 others, High Court of Kenya Civil Case No. 30 of 2010**, which awarded general damages separately to each individual member of the family because the loss is individual as well as the resultant long-time effects.

He concluded that in the instant case there are 4 family members and each of them would be apportioned UGX 750million for their survival which is appropriate in the circumstances.

Counsel for the Defendants submitted that notwithstanding the fact that the deceased contributed to her own death the remedies as prayed for b the Plaintiff are exorbitant, exaggerated, inflated and made in bad faith. That damages are awarded at the discretion of court depending on the prevailing conditions and prior decisions relevant to the case in question as per the case of **Moses Ssali aka Bebe Cool versus AG and Other, HCCS No. 86 of 2010.**

A close scrutiny of the written statement of defence reveals that the Defendants don not plead the claims raised by Defence Counsel in the submissions.

The Plaintiff on the other hand prayed for special damages under paragraphs 7 and 9 of the plaint. PW1's witness Statement on oath under paragraphs 5, 6, 7, 8 and 9 allude to the specifics of the damages, Shs. 16,300,000/= is claimed for medical, post-mortem report and funeral expenses.

PW1 indicated that most of the documents to support his claim were lost during the funeral period. In **Kyambadde versus Mpigi District Administration [1983] HCB 44,** Court held that funeral expenses as pleaded would be awarded although as special damages proof thereof is strict. However, failure to attach receipts of expenditure in proof of funeral expenses was excusable because at the time of bereavement, it may not be possible to attend to details such as asking for receipts. This Court therefore finds that special damages were proved by the Plaintiff and I do hereby award Shs. 16,300,000/= as special damages.

Secondly, there was a claim of general damages which the Plaintiff classified as loss of dependency and benefits that would accrue to him and the children of the deceased as alluded in paragraphs 8 and 9 of the plaint to the time of UGX 72,455,400/=.

Although the above was not opposed or replied to by Counsel for the Defendants, I decline to grant the same because it will be covered under damages based on negligence, unlawful death, loss of life, loss of care, pain and suffering, mental and psychological torture, anguish, pain and the Dependants being left motherless by loss of a parent and the Plaintiff being a widower which was alluded to in paragraph 8 of the evidence in Chief. The Plaintiff claimed further general damages to the tune of UGX 3 billion.

The right to life is not only protected under the Constitution, but it is inherent. As has already been held, the deceased met her death under circumstances of gross negligence. I also agree with the submissions of Counsel for the Plaintiff that the deceased was working as a nursing aid, she died at an early age of 35 years when she was fulfilling a natural duty of co-creation and giving birth to another life. As a nurse she had a bright and prosperous future. The 2nd and 3rd Defendants who would have saved the life of the deceased most especially a workmate acted in the most deplorable manner. The life of the deceased would have been saved and life is lived once and when it is lost, it cannot be compensated by any amount of money. So since the life was permanently lost, the Plaintiff has prayed for general damages of UGX 3billion.

However, it is the finding and holding of this Court that UGX 3 billion is on a higher scale. In the circumstances, I am inclined to reduce it by half and so I award a sum of UGX 1.5 billion as general damages. All in all, and in view of what I have outlined above, I do hereby enter judgment in favour of the Plaintiff under the following terms;

i. An order that the 1st Defendant pays special damages of UGX 16,300,000/=.

ii. An order for the 1st Defendant to pay ordinary general damages of UGX 1.5 billion for the negligence of the 2nd and 3rd Defendants.

iii. Costs of the suit are awarded to the Plaintiff.

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WILSON MASALU MUSENE

JUDGE

03/10/2019